UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 57 MARCH NUMBER 6

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

THE "BALANCE OF INJURY" AS A REASON FOR REFUSING AN INJUNCTION TO RESTRAIN A NUISANCE.

In the recent case of *McCarthy* v. *Bunker Hill and Sullivan Mining Company*,[1] the complainant, a riparian owner, brought a bill to perpetually restrain the mining company from so operating their mills and concentrators as to pollute the stream which ran through the complainant's land. The damage alleged was that the water was rendered unfit for domestic purposes, and that a poisonous sediment was deposited on complainant's land, which rendered the soil unfit for agriculture. The de-

[1] 164 Fed. 927 (C. C. A., 9th Circ.).

fendant denied the allegations and stated that he was operating his mines and concentrators in a careful and reasonable manner; that if the injunction was granted it would necessitate the closing of the mines, which employed over 10,000 persons and in which a large amount of capital was invested, and that it would as a result of throwing a large number of persons out of employment, practically destroy the business of important towns and the markets for the products of many farms.

The Court refused the injunction on two grounds. First, because there was a substantial conflict in the proofs. Second, because the comparative injury resulting from granting the injunction would be greater than the injury resulting from refusing it.

There is some conflict in the cases as to whether the second ground of the decision is sound or not.

It is generally recognized to be applicable where the bill is for a preliminary injunction.[2]

The cases in which the doctrine of the balance of injury is involved are often divided into two classes. First, where the injunction if granted would cause the defendant greater injury than would result to the plaintiff if not granted. Second, where the public would suffer if the injunction were granted. In most of the cases, however, as in the principal case, both these results concur.

The jurisdiction of equity to restrain nuisances is in aid of the legal right, when the legal right is inadequate, and to prevent a multiplicity of suits.[3]

The Court, then, must in every case be satisfied that the act of the defendant amounts to a tort. This in cases of the pollution of streams and making the air impure is often a troublesome question, depending on what is a reasonable use, for each particular locality.[4]

But once it is admitted that the legal tort exists and is continuing, the question arises; should the injunction follow as of course, or must the complainant show actual damage, or does it depend on the comparative injuries?

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[2] *Evans* v. *Fertilizing Co.*, 160 Pa. 209, 224; *Sellers* v. *Parvis*, 30 Fed. 164; *Milling Co.* v. *Tenn. Coal Co.*, 123 Fed. 811.

[3] Kerr on Inj.,* 166; I High on Inj., sec. 739.

[4] *Gilbert* v. *Showerman*, 23 Mich. 448.

For an extreme case denying the right of an action at law for the pollution of a stream on the ground that the rights of an individual must give way to the interests of the community, see *Sanderson* v. *Coal Co.*, 113 Pa. 126.

It has been held that no actual damage need exist.[5] Even though the public will be injured by granting the injunction.[6]

There are also cases in accord with the principal case which say the injunction will be refused if it will do more harm to grant it than to refuse it.[7]

The Courts in these cases intimate that the remedy at law is adequate.[8] But it is submitted that the amount of damage which will result to the defendant or the public by the granting of the injunction is no test of the adequacy of the remedy at law. The weight of authority seems to be that the injury to the defendant or the public cannot be considered.[9]

It is noticeable that in the majority of the cases where an injunction was refused there was some other element present besides the mere balance of injury, such as laches, or the fact that the complainant's right was not clearly proved, as in the principal case.[10]

Then, again, the cases where the injunction was refused were usually cases of the pollution of water or of rendering the air impure. That is an infringement of purely incorporeal property. While on the other hand, in cases where the water of a stream has been deviated from the complainant's land, the injunction has been granted even if there was shown no actual damage.[11]

Where the damage resulting from the injunction is only to the defendant, he should not be allowed to say that the complainant should be deprived of his remedy because it would injure the defendant.[12] And if the public interests are concerned, is would seem to be a case for legislation.

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[5] *Webb* v. *Portland Manuf. Co.*, 3 Summ. 189.

[6] *Smith* v. *Rochester*, 45 N. Y. 612.

[7] *Clifton Iron Co.* v. *Dye*, 87 Ala. 468; *Doughty* v. *Warren*, 85 N. C. 138; *Mountain Copper Co.*, v. *U. S.*, 142 Fed. 625.

[8] Richard's Appeal, 57 Pa. 105; *Simpson* v. *Justice*, 8 Ired. Eq. 120.

[9] Pomeroy, Eq. Jur., vol. 5, par. 530, 531.

[10] Ibid, note 115 and 116.

[11] *Webb* v. *Portland Manuf. Co.*, 3 Summ. 189; *Smith* v. *Rochester*, 45 N. Y. 612.

[12] *Weston Co.* v. *Pope*, 155 Ind. 394.